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IN THE

Supreme Court of the United States

October Term, 1950.

No. 49

DOROTHY BAILEY, *Petitioner,*

v.

SETH W. RICHARDSON, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

REPLY BRIEF FOR PETITIONER.

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1. The Government's brief in effect admits that the procedure in the Dorothy Bailey case is indefensible. By its silence on the point, the Government confesses that, as applied in the Bailey case, the elaborate hearing procedures set forth in the President's Loyalty Order are meaningless trappings; an empty gesture to the fundamental principles of our democracy, devoid of substance. Dorothy Bailey was heard. She was represented by counsel. Her testimony and the testimony of witnesses on her behalf were

faithfully transcribed. But the entire process was a hollow mockery. Neither Dorothy Bailey nor her lawyers—nor even her judges—knew the identity of her accusers. Dorothy Bailey and her lawyers were not informed of the details of the accusation.

Dorothy Bailey was not convicted of disloyalty to her government on the basis of a single line of evidence in the record. In fact, she was not convicted by her judges. She was convicted by nameless investigators who certified to her nominal judges that her nameless accusers were reliable.

This the Government does not, and cannot, dispute. It is the horrifying fact of this case. The Government attempts to meet it, first, by insisting that the procedure is technically valid; second, by insisting that the full responsibility for it is on the Executive Branch, and that the courts may not intervene; and third, by an attempt to justify this ultimate degradation of democratic procedure by an elaborate exposition of the Communist menace.

A major part of the Government's brief (pages 13 to 55) is devoted to this third point. The intransigent and dangerous policy of the Soviet Union is not in issue in this case. We agree that there is ample justification for the Government of the United States to take measures to protect itself against Communist infiltration in Government positions. We point out, however, that there is not a word of evidence in the record before this court connecting Dorothy Bailey with Communism, the Soviet Union, or the infiltration of the Government.

We agree, as the Government's brief so vividly portrays, that many influential groups in this nation have become more concerned about the elimination of Communists from the Government service and our national life than they are about the specific values of due process and individual rights. Despite the unusual tenor of the Government's brief, we are not persuaded that these values must or may

be destroyed in order to defend ourselves against a hostile power and an international revolutionary movement which also seek the destruction of individual rights.

We believe that the Bill of Rights was adopted because the people of this country anticipated that in times of crisis demands would inevitably be made to visit punishment upon citizens because of suspicion or panic. The Bill of Rights was designed to be brought into play in times of crisis—not discarded. In such times the Bill of Rights is designed to protect individual Americans against the tendency of the Executive Branch to yield to popular pressures. And the courts were chosen to implement that protection.

The government attempts to reassure the Court that individual rights are not in danger by showing in its brief that the members of the Loyalty Review Board who sat on Miss Bailey's case are prominent attorneys, most of whom have held high public office. The inference is that the judgment of such important persons in these delicate matters is an adequate substitute for a fair hearing. We would disagree even if these gentlemen had exercised their judgment on the reliability of the information on which Dorothy Bailey was found to be disloyal.[1] But the record is clear that they did not do so. They abdicated that function to the FBI. They accepted the FBI's evaluation of the reliability of the informants against Miss Bailey. They never saw the informants nor did they know who they were. The real decision in the case of Dorothy Bailey was made not by the members of the Board, but by some unknown agent of the Federal Bureau of Investigation.

2. *United States* v. *Lovett*, 328 U. S. 303, held that the permanent proscription of named individuals from govern-

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[1] "And anyway, as I have said before, personal confidence in the officials involved does not excuse a judge for sanctioning a procedure that is dangerously wrong in principle." Dissenting opinion of Justice Jackson, *U. S. ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 551.

ment employment on the ground that they were disloyal was a punishment of those individuals which could not be imposed without a trial. The government argues that the *Lovett* case has been limited or modified by *American Communications Association* v. *Douds*, 339 U. S. 382, because the *Douds* case permits the exclusion of Communists as a class from access to a government agency.

We may assume that Communists as a class can be excluded from the Government payroll without violating the Constitution. The *Lovett* case does not establish a contrary conclusion.

But the fact that Communists may be excluded does not mean that any individual who denies being a Communist can be declared ineligible without a hearing which meets the requirements of due process. The *Douds* case did not raise this issue. It does not affect the holding of the *Lovett* case in this regard. In the latter, it was the declaration of the ineligibility of specific individuals without a hearing which made the Congressional action invalid. It is the adjudication of disloyalty and the consequent declaration of ineligibility of Dorothy Bailey without evidence which makes the sentence against her invalid.

Dorothy Bailey has taken the non-Communist oath. (See e.g. R. 20, 22, 23, LB 3, 15-19). She has gone further and affirmatively proved by other evidence that she is not a Communist. The reasons of public policy which justify the President in excluding Communists from government employment do not and cannot under our Constitution remove the necessity of proving by appropriate evidence that Dorothy Bailey belongs to the excluded class. The *Douds* case does not imply that a labor official who took a non-Communist oath could nevertheless be denied access to the Board because the Board chose, without a hearing, to disbelieve him.

The *Douds* case in no sense overruled *Lovett*. The *Bailey* case is, we submit, governed by this Court's holding in *Lovett*. The proscription of an individual from government

employment is punishment which, when decreed by the Congress is a bill of attainder. When it is imposed by an administrative agency, it requires that due process be accorded to the individual.

3. The government argues that the President did not mean evidence when he said "evidence." It cites a small part of the lengthy report by the President's Temporary Commission on Employee Loyalty recommending that a program of hearings with respect to loyalty be set up and stating that a fair hearing may be had without confrontation. (Brief, pp. 105, 106) There is no reason to assume that the President accepted the recommendations of this Committee in all its details. His use of the word "evidence" and his expressed desire to afford "protection" to the employee indicates by all reasonable standards of construction a desire that employees should be condemned only on evidence.

Indeed, the government establishes (see n. 74, pp. 107-111 of Brief) that even the Loyalty Review Board believed confrontation was contemplated by the Order. Its decision not to require confrontation was based on assumed practical considerations and not on the intention of the President's Order. (See n. 74, pp. 107-111 of Brief). An examination of the Board's letter set forth in n. 74 establishes that the Review Board admitted that it was not carrying out the President's program "as planned" for the following reason: (see p. 109)

> "We were therefore faced with the decision whether to refuse at all times to disclose the Bureau report to the employee—save in the exceptional cases noted above—or to advise the Civil Service Commission that, in our opinion, the proposed loyalty program *as planned* should not be permitted to function." (Emphasis supplied)

4. The government argues that the dismissal for disloyalty is no different from dismissal for inefficiency or any other ground. Plainly, the Congress did not agree in this

respect. It recently made a clear distinction between dismissals on grounds related to the particular job and adjudications of disloyalty entailing ineligibility for governmental service. This was done in the legislation referred to in our main brief, page 31, permitting dismissal without evidence from sensitive agencies and authorizing the President to extend that power to new agencies as deemed necessary. P. L. 733, 81st Congress. The congressional determination that dismissals on grounds other than loyalty could be made in a summary manner was justified on the ground that the employee would not be ineligible for other government employment. See S. Rep. No. 2158, 81st Cong. 2d. Sess. quoted page 31 petitioner's original brief). This is a clear indication that the Congress realized that an adjudication of ineligibility on disloyalty grounds was different in kind and quality from a dismissal for such causes as inefficiency, unreliability or similar grounds related to a particular job.

5. The government also indicates that dismissals for loyalty involve considerations of a character which the courts are not equipped to try. (See pp. 77-78 of the brief.) Again, the government is expressing a position at variance with that expressed by the Congress. For most recently in the McCarran Act (Internal Security Act of 1950, P. L. 831, 81st Cong.), the Congress insisted that similar determinations, i.e., bearing on the Communist character of organizations, should be subject to complete judicial review, after open hearings under all the safeguards of the Administrative Procedure Act.

6. The government cites many cases designed to show that hiring and dismissal are executive functions and that erroneous exercise of admitted power cannot be corrected by the courts. This is true but the government concedes (p. 65), as it must, that where subordinate officials have not complied with applicable regulations laid down by executive order or by statute, a dismissal is illegal and the courts will reinstate the employee with back pay. *U. S.* v.

Wickersham, 201 U. S. 390; *U. S.* v. *Perkins*, 116 U. S. 483; *Borak* v. *Biddle*, 141 F. 2d 278 (App. D. C., 1944), cert. den. 323 U. S. 738; *Wittner* v. *United States*, 110 C. Cls. 231; *United States* v. *Elchibegoff*, 106 C. Cls. 541, cert. granted on petition of government November 12, 1946, 329 U. S. 704, writ dismissed on petition of government February 3, 1947, 329 U. S. 694. (The *Wickersham, Borak, Wittner* and *Elchibegoff* cases are cited on page 65 of the government's brief.)

And *United Public Workers* v. *Mitchell*, 330 U. S. 75, also cited by the government, is a recent holding that a federal employee has standing in court to protect his job against illegal, arbitrary or unconstitutional action by the government. Accordingly, Miss Bailey plainly has standing to complain to the courts that the decision against her violated the Executive Order and the Constitution.

7. The government argues that the Administrative Procedure Act exempts "from its coverage the selection or tenure of an officer or employee of the United States other than examiners." (Brief, p. 106) This is an inaccurate statement. The exemption is only from Section 5 of the Act (5 U. S. C. § 1004) and the effect of this exemption is merely to make it unnecessary to have an impartial hearing examiner and to follow the procedure specified before that examiner. Section 10 of the Act (5 U. S. C. § 1009) providing for judicial review of "agency action" contains no such exemption. The statute defines "agency action" as including "the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U. S. C. § 1001(g). Thus, although petitioner was not entitled to the hearing before an impartial examiner provided in Section 5 of the statute, she is entitled under Section 10 to review agency action under at least four of the standards set forth under Section 10(e). That section authorizes the courts to hold unlawful and set aside agency action "found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; . . ."

Respectfully submitted,

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MOTION OF NATIONAL LAWYERS GUILD FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

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